Nexstar Broadcasting, Inc. d/b/a KOIN-TV *and* National Association of Broadcast Employees & Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL–CIO. Case 19–CA–232897

January 7, 2021

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND MCFERRAN

On June 3, 2020, Administrative Law Judge Christine E. Dibble issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions. The Respondent also filed a reply brief to the General Counsel's answering brief and a brief in opposition to the Charging Party's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4.

4. By issuing a written warning to Ellen Hansen on July 12, 2018, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In affirming the judge's credibility findings, we do not rely on employee Benjamin Moore's acknowledgment that he did not report to management all his other allegedly "contentious conversations" with employees.

Under three different theories, the judge found that the Respondent violated the Act when it issued a written warning to employee and Union Executive Board Member Ellen Hansen. We affirm the judge's finding of a violation only under *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), which the Respondent concedes applies here.

The judge also found a violation under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, as the judge acknowledged, *Burnup & Sims*, not *Wright Line*, governs where, as here, an employer disciplines an employee for allegedly engaging in misconduct during the course of union activity, and the General Counsel contends that the employee did not, in fact, engage in misconduct. See, e.g., *La-Z-Boy Midwest*, 340 NLRB 80, 80 (2003), enfd. in pertinent part 390 F.3d 1054 (8th Cir. 2004). In *General Motors LLC*, 369 NLRB No. 127 (2020), we held that the Board will no longer apply various setting-specific standards and decide whether misconduct in the course of protected activity lost the employee the Act's protection. Instead, in all such cases, the Board will apply *Wright Line*. Id., slip op. at 1–2. But we clarified that the directive to apply *Wright Line* in such cases "presupposes that the employee actually engaged in the misconduct," and that nothing in the *General Motors* decision should be read as conflicting with *Burnup & Sims*. Id., slip op. at 10 fn. 27; see also *Nestlé USA, Inc.*, 370 NLRB No. 53, slip op. at 1 fn. 2 (2020). Here, the judge found, and we agree, that Hansen did *not* engage in misconduct in the course of her protected conversation with Moore. The judge also found a violation under *Atlantic Steel Company*, 245 NLRB 814 (1979). However, *Atlantic Steel* was one of the cases the Board overruled in *General Motors*, supra, after the judge issued her decision. Member McFerran did not participate in *General Motors*, and does not pass on whether it was correctly decided, but agrees with her colleagues that *Burnup and Sims* governs this case.

We affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the name of the witness to Hansen's conversation with Moore. In doing so, we note that, contrary to the judge's characterization, the Respondent's handbook does not provide an unqualified pledge of anonymity to witnesses. At this juncture, however, we decline to order the Respondent to provide the Union with the name of the witness. The Union requested the witness's name so it could conduct its own independent investigation of the incident that resulted in Hansen's written warning. We have affirmed, however, the judge's finding that the written warning was unlawful, and we will order the Respondent to rescind the warning and take other appropriate remedial measures. Accordingly, we find that the Union no longer has any need to conduct an investigation, and thus it has no need for the witness information. Under the circumstances, we disagree with our dissenting colleague that there is a "remedial dispute" that would warrant ordering the Respondent to provide the witness information but permitting further litigation of the need for this remedy in compliance under the framework set forth in *Boeing Co.*, 364 NLRB No. 24 (2016).

Member McFerran would order the Respondent to provide the Union with the witness's name, though permit the Respondent an opportunity to establish in compliance that the Union has no present need for that information. In *The Boeing Company*, 364 NLRB No. 24, slip op. at 4–5 (2016), the Board set forth a clear framework for litigating remedial disputes over whether a party that has been unlawfully denied requested information still has a need for the information. The Board held that when evidence that the requesting party may no longer need the requested information becomes available after the merits hearing, the respondent may litigate the issue at the compliance stage of the case. Member McFerran would adhere to that framework here.

[2] We shall amend the judge's Conclusions of Law to conform to our findings.

[3] We shall modify the judge's recommended Order to conform to the amended conclusions of law and to the Board's standard remedial language, and in accordance with our decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified. We reject the Union's request for expanded remedies because the Union has not demonstrated that the Board's traditional remedies are insufficient.

ORDER

The Respondent, Nexstar Broadcasting, Inc. d/b/a KOIN-TV, Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing written warnings to employees that interfere with activities protected by Section 7 of the Act.

(b) Refusing to bargain collectively with National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL–CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the July 12, 2018 written warning issued to Ellen Hansen.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written warning issued to Ellen Hansen, and within 3 days thereafter, notify her in writing that this has been done and that the written warning will not be used against her in any way.

(c) Post at its facility in the Portland, Oregon metropolitan area copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 7, 2021

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[4] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT issue you written warnings that interfere with your exercise of any of the rights listed above.

WE WILL NOT refuse to bargain collectively with National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL–CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful written warning issued to Ellen Hansen on July 12, 2018.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warning issued to Ellen Hansen, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the written warning will not be used against her in any way.

NEXSTAR BROADCASTING, INC. D/B/A KOIN-TV

The Board's decision can be found at www.nlrb.gov/case/19-CA-232897 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Sarah C. Ingebritsen, Esq., for the General Counsel.
Anne I. Yen, Esq., for the Charging Party.
Charles W. Pautsch, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Portland, Oregon on August 13, 2019. The National Association of Broadcast Employees & Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL–CIO (Charging Party, Union or NABET) filed charges in case 19–CA–232897 on December 17, 2018.[1] (GC Exh. 1(a), 1(b).)[2] On April 25, 2019, the General Counsel issued a complaint and notice of hearing for case 19–CA–232897. (GC Exh. 1(c).) Nexstar Broadcasting, Inc., d/b/a KOIN-TV (the Respondent/KOIN-TV) filed a timely answer to the complaint denying all material allegations. The Respondent also amended its answer to paragraph (5)(d) of the complaint by admitting that at all material times, based on Section 9(a) of the National Labor Relations Act (the Act/NLRA), the Union has been the exclusive collective bargaining representative of the units. (Tr. 11–12.)

The complaint alleges that the Respondent violated Sections 8(a)(3) and (1) of the Act when (1) on or about July 12, the Respondent conducted a disciplinary meeting with Hansen whereby she was issued a written warning alleging she had harassed a coworker during a conversation; and (2) on or about July 12, the Respondent has failed and refused to furnish the Union with information it requested on the same date in violation of Sections 8(a)(5) and (1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the business of operating a television station in Portland, Oregon. During the 12-month period ending December 31, a representative period, the Respondent has purchased and received goods valued in excess of $50,000 directly from points outside the state of Oregon and derived gross revenues valued in excess of $100,000. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

It is undisputed and I find that the Union at all material times has been a labor organization within the meaning of Section 2(5) of the Act. The following of the Respondent's employees constitute units appropriate for purposes of collective bargaining, and the Union has been the exclusive collective-bargaining representative of these units:

> All regular full-time and regular part-time engineers and production employees, but excluding chief engineer, office clericals, professionals, guards and supervisors as defined in the Act, and all other employees of KOIN-TV.
>
> All regular full-time and regular part-time news, creative services employees, and web producers, but excluding news producers, IT employees, on-air talent (aka "performer"), office clericals, professionals, guards and supervisors as defined in the Act, and all other employees of KOIN-TV.

[1] All dates are in 2018, unless otherwise stated.

[2] Where applicable, abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "CP Exh." for Charging Party's exhibit; "Jt. Exh." for joint exhibit; "GC Br." for General Counsel's brief; "R. Br." for Respondent's brief; and "CP Br." for Charging Party's brief. My findings and conclusions are based on a review and consideration of the entire record.

(GC Exh. 1(c), 1(e); Tr. 11–12.) The Union has represented employees at KOIN-TV for about 14 years. During all relevant times until January 17, 2017, the Union had been "the exclusive collective-bargaining representative of the Units employed by Media General KOIN-TV, and during that time recognized as such representative by Media General KOIN-TV. This recognition was embodied in successive collective bargaining agreements, the most recent of which was in effect from July 29, 2015 to July 28, 2017." Id.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Organization

On or about January 17, 2017, the Respondent bought LIN Television Corporation, a Media General Company, d/b/a KOIN-TV (Media General KOIN-TV), and has continued to operate Media General KOIN-TV in virtually unchanged form, employing the majority of the individuals who were previously employees of Media General KOIN-TV. Based on its operations as described in paragraphs 2(a) and 2(b) of the complaint, the Respondent has continued as the employing entity and is a successor to Media General KOIN-TV.

The Respondent's television station in Portland, Oregon employs about 110 employees.[3] Patrick Nevin (Nevin) is the Respondent's vice president and general manager of KOIN-TV in Portland, Oregon. He has oversight of all departments at the facility. During the relevant period, Rick Brown (Brown) was operations manager and reported to Nevin. Terri Lynn Bush (Bush) is associate counsel and vice president of human resources. The Respondent's business administrator for the past 10 years has been Casey Wenger (Wenger). He is responsible for business and financial functions within the company, and local human resources administration. In his role as human resources administrator, he serves on the management side bargaining team for contract negotiations with the Union. The Respondent's news director is Rich Kurtz (Kurtz). Tim Bush is president of Nexstar.[4]

B. Hansen and Moore's Conversation

The backdrop for this complaint is the contentious negotiations for a successor collective-bargaining agreement (CBA) the parties have been negotiating since June 2017.[5] The Respondent's negotiating team consists of Nevin, Wenger, Brown, and Kurtz.[6] The Union is represented in bargaining sessions by Carrie Biggs-Adams (Biggs-Adams), president of Local 51 and previously union business representative; and Ellen Hansen (Hansen), union executive board member and employed with the Respondent as a photographer, editor, truck operator. During the bargaining sessions, Hansen's role is to take notes while Biggs-Adams, as the chief negotiator, does the speaking on behalf of the Union.

Hansen has been an active and open union supporter since at least 2005 when she served as a union steward from about 2005 to 2010. In support of the Union, she has worn union apparel to work, discussed contract negotiations with coworkers, and answered their questions about various union matters. As a union executive board member, Hansen introduces herself to new employees, welcomes them to a "Union shop," and advises them to contact her with questions about the Union. In her initial conversations with new employees, Hansen tries to be "brief and casual." (Tr. 27.) She normally holds these conversations with new employees in a private area during non-work times. Since the parties do not currently have a CBA, Hansen, when speaking to employees about joining the Union, informs them there is no contract and union membership is voluntary.

Benjamin Moore (Moore) had been employed with the Respondent for about 3 years as a dayside photojournalist before transferring in March 2019 to his current television station in Harrisburg, Pennsylvania. He worked with Hansen at the Portland station from March 2018 to May 2019. Prior to joining the Portland office, Moore was aware of the ongoing contract negotiations between management and the Union. He also knew of Hansen before she introduced herself.

In May, Hansen held separate new employee welcome conversations with photographer Jahad Harvey (Harvey) and Moore. Harvey told Hansen that he did not have questions because he would be speaking with Brown the following week. It is undisputed that on May 18, Hansen greeted Moore to talk with him about the advantages of union membership and they engaged in a conversation which lasted about 10 or 15 minutes; and it occurred between 6:00 pm to 6:30 pm in the photography area at the editor's booth with him seated and her standing on the other side of the half-wall partition. Their agreement on the facts end here.

According to Hansen, she approached Moore to introduce herself and told him that she heard Brown was speaking with new employees about the Union and asked if he had already spoken with Brown. Moore seemed surprised to her by the question but not offended. Nevertheless, he told Hansen that he had spoken with Brown but did not want to discuss it. Hansen responded that was "okay" but if he had any questions about the Union, she would be happy to answer them. Hansen testified that as she was leaving, Moore said, "well, why don't you give me your take?" (Tr. 31.) At this point in the conversation, she was in the hallway headed towards the garage and Moore was seated on the other side of the half-wall partition in the photography area where employees perform editing tasks. Hansen started telling him the history of the Union and the reasons she felt a union in the workplace was important. It is undisputed that Moore either asked if the Union is for "your protection" or responded he understood why "you would want a Union, for protection." (Tr. 32, 85.) According to Hansen, the conversation then ended with Moore stating that he would tell her Monday which she assumed meant whether he would join the Union. She denied asking him if he

[3] Unless otherwise noted, references to the Respondent's television station or facility are for the Portland, Oregon location.

[4] In order to avoid confusing Tim Bush with Terri Lynn Bush, Tim Bush will be referred to by his full name.

[5] Although there is not a CBA in place, the Respondent's employees continue to be bound by its various company policies. The policies relevant to the complaint at issue are: "business code of conduct policy," and "non-retaliation protection policy," and "anti-harassment policy." (Jt. Exh. 2.)

[6] Hansen testified that occasionally Tim Bush would join the Respondent's team in bargaining sessions.

was going to join the Union and believes the entire conversation lasted about 10 minutes. Based on Hansen's perception of his body language, Moore appeared relaxed to her; and she perceived his conversational tone as casual. Hansen did not recall much more about the conversation with Moore but acknowledged she probably mentioned management because she usually tells new employees that management frequently changes and is not always on the side of employees, but the Union is a stabilizing force. Nothing about her conversation with Moore struck Hansen as unusual. Hansen did not observe anyone else nearby or within earshot of the conversation.

According to Moore, after Hansen greeted him with talk about the benefits of joining the Union, she accused him of having secret meetings with Brown. He testified that Hansen told him Dean and Brown used this "scheme" to not to tell new people about the Union until they got "out there" and once "here" the new hires would learn about dues and "other things" which would frustrate the new hires and turn them against the Union. I will credit Moore on this point. Hansen acknowledged that she mentioned to him that management frequently changes and is not "always" supportive of its employee; but does not recall her exact words. Moore, on the other hand, was clear in his recollection. Moreover, his version has the ring of truth because it is not so far outside the realm of what Hansen admitted to usually telling new employees. Moore also insists that Hansen continued the conversation by bad mouthing Brown and calling him a "piece of shit" and "rat fuck." Due to what Moore perceived to be a lot of "foot traffic" in the area where anyone could hear their conversation, he felt uncomfortable because he did not want it to get back to Brown that he was "associated" with Hansen's negative views and "bashing" of management so Moore claimed that he did not say much in response. Moore labeled Hansen's statements to him as a "rant." Last, Moore acknowledged on cross-examination that he has been speaking with Nevin about returning to the Portland, Oregon television station and has an interest in staying in the Respondent's good favor.

C. Respondent's Investigation of Moore's Allegations and Issuance of Discipline

The following Monday or Tuesday after his conversation with Hansen, Moore told Brown that Hansen had spoken disparagingly about Brown and pressured him to sign papers to join the Union. Moore claims that he told Brown Hansen called Brown a "piece of shit" and "rat fuck." In early June, Nevin learned from Brown about Moore's allegation. Brown told him Moore was uncomfortable with the conversation and despite telling Hansen that he wanted to end it, she persisted. Nevin conferred with Brown about involving human resources and decided to have Wenger investigate the matter. Consequently, Brown contacted Wenger who discussed the situation with Nevin before beginning the investigation.

According to Wenger, the purpose of the investigation was to determine if Hansen had harassed Moore. Wenger began the investigation with a meeting on June 11 involving himself, Moore, and Brown. While Wenger took notes, Moore again explained his version of the discussion with Hansen. (GC Exh. 2; Tr. 121–124.) Wenger is adamant that Moore said Hansen used the terms "rat" and "piece of shit" to describe Brown as opposed to "rat fuck". Nevin also used those terms in his descriptions of Moore's allegation against Hansen. During the investigatory interview, Moore also mentioned that another employee passed them while Hansen was talking and made "eye contact" with him. Consequently, Wenger interviewed the unnamed witness alone, and prepared notes of the interview the same day, June 15. Supposedly, the unnamed witness claimed: (1) she heard Moore tell Hansen that he was not interested in the conversation; (2) it appeared to the anonymous witness that their conversation was strained; and (3) she thought Moore looked uncomfortable. Wenger believes that the witness requested to keep her name confidential; and after conferring with Nevin, they agreed. I do not credit any evidence provided by the anonymous witness because the Charging Party and General Counsel did not have the opportunity to question the witness and verify the accuracy of the Respondent's summary of her statement or test any inconsistencies in her statement.[7] *Metropolitan Edison Co*., 330 NLRB 107, 107 (1999) (name of informant can be withheld only if employer establishes a legitimate and substantial confidentiality defense). Moreover, the witness' statement is hearsay; and the anonymous witness admitted that she "didn't hear any specifics of the conversation." (Tr. 102–103.) Consequently, the statement has no probative value.

On June 18, Wenger again met with Moore to confirm his prior statements and ask if he wanted to add information. (GC Exh. 2.) At this meeting, Moore mentioned that Hansen had not approached him since their May 18 conversation; and "he has not seen or heard of her approaching other employees." (GC Exh. 2.) Moore had nothing else to share with Wenger. During the course of the investigation, the Respondent also questioned several employees on whether Hansen had made statements to them that the Respondent was cutting wages, which made them uncomfortable. The Respondent admits, however, that no other employees had complained to managers or supervisors about "uncomfortable" conversations with Hansen.[8]

After the "investigation" Nevin and Wenger contacted Bush, Tim Bush, and the Respondent's counsel, Charles Pautsch (Pautsch) to "discuss the next steps in the investigation regarding this incident." They decided next to interview Hansen. The Respondent contacted Hansen to schedule a meeting for her to be interviewed. She was told the meeting would address "harassment." She contacted Biggs-Adams to represent her in the meeting. On June 28, Nevin, Wenger, and Hansen met in Nevin's Portland office with Bush and Biggs-Adams participating

[7] My reasons for rejecting statements attributed to the anonymous witness is discussed in more detail under the section of the decision which addresses the request for information allegation.

[8] Nevin testified that there "may have been one instance" where an employee, Jordan Aleck (Aleck), complained that Hansen persistently questioned her about joining the Union. Aleck did not testify in these proceedings. I do not credit Nevin's testimony on this point. Nevin's testimony was vague noting that there "***may***" have been one instance of Aleck reporting Hansen; and he also did not know when the alleged conversation occurred. Moreover, it is hearsay because according to Nevin, Aleck actually told Wenger about the incident. However, Wenger did not offer any corroborating testimony of the alleged incident; and the Respondent failed to address why it did not produce the best evidence on this point, Aleck.

telephonically. The meeting lasted about 20 to 25 minutes. Nevin started the meeting by explaining to Hansen and Biggs-Adams that management was investigating allegations that Hansen had engaged in conversations with coworkers which possibly violated company policies. Reading from a list of questions, Nevin asked Hansen about her recollection of the conversation with Moore, including when and where the conversation occurred and what was said. He also asked her if she had held other discussions with Moore, union members and, or coworkers about issues related to CBAs, theoretical pay cuts under potential new owners or used derogatory comments to refer to coworkers. As part of the interview, Nevin questioned Hansen on whether she use the terms "rat" and "piece of shit" to describe Brown.[9] Although Hansen denied it, Nevin testified that he did not believe her because she "paused" before responding and did not seem credible to him. Nevin, however, admits Hansen told him Moore continued the conversation by asking her several questions about the Union as she was ending their discussion.

Once Hansen learned that the meeting was about her conversation with Moore on May 18, she was surprised because she felt the interaction was so inconsequential that she did not recall much about it. In the meeting, she was told that the Respondent's policy is "nobody is ever to call people names" and was asked if she had ever "called management names." She insisted that she did not recall ever using the phrases "rat bastard" and "piece of shit" to describe Brown and noted they are not phrasings that she normally uses, nor would use. Hansen and Biggs-Adams were told they would be informed of the investigation's findings at its conclusion.

On or about July 12, Hansen met in-person with Nevin and Wenger. Kevin Wilson (Wilson), union president, participated telephonically as Hansen's representative. During the meeting, Hansen was issued a written warning for harassment and violating company policy relating to her conversation with Moore. Attached to the letter was the company's "Business Code of Conduct Policy, Anti-Harassment Policy and the Non-Retaliations Protection Policy" for her review.[10] (Jt. Exh. 2.) Also, there is no evidence in the record of management enforcing these policies against other employees. Hansen testified that she was also told in the meeting to "never . . . say anything bad about managers." (Tr. 40.)

It is undisputed that in her years employed with the Respondent, Hansen has never seen a general manager involved in a disciplinary/investigative meeting similar to the ones conducted against her. Moreover, she is unaware of any other employee who has received written discipline for similar conduct. Hansen has heard other employees make disparaging remarks about management but to her knowledge they were not disciplined. Likewise, Hansen has heard other employees disparage management, but has never known any employee to report to management about employees who made those remarks.

D. Credibility Determinations

I do not credit Moore's testimony that (1) Hansen "accused" him of having a secret meeting with Brown; (2) Hansen asked when he was going to sign documents to join the Union; and (3) Hansen called Brown a "piece of shit" and "rat/rat fuck." First, I do not credit his testimony that Hansen pressured him to "sign those papers" and join the Union. (Tr. 86.) Although, Moore makes the claim about Hansen pressuring him to join the Union, this allegation was not in any of the Respondent's investigatory notes documenting Moore's description to management of his conversation with Hansen. (GC Exh. 2; Jt. Exh. 1; R. Exh. 3.) There is no evidence to corroborate Moore on this point or to explain the absence of his claim in the Respondent's investigation. Despite his claim the he felt Hansen was pressuring him to join the Union, he admitted that he continued the conversation with her when he asked her "take" on the usefulness of union membership. Likewise, Moore could not explain management's failure to mention this significant allegation in any of its investigative notes. Consequently, I credit Hansen's testimony that she did not pressure Moore to hurry and join the Union.

Likewise, I find that Hansen is more credible in her denial that she called Brown derogatory names. Moore admits that he was "just covering for myself" when he reported his discussion with Hansen because he was afraid Brown would hear about it before he had an opportunity to give them his "side of things." (Tr. 86.) He also testified that he had been speaking with Nevin and trying to stay in "good" with management because he wants to get a job back in the Portland station; and he knew the Union and management were locked in a battle over negotiating a new CBA. Consequently, he would have more incentive to exaggerate and misconstrue the remarks Hansen made to him in order to remain in management's good favor to ensure his desired transfer to the Portland facility. Further, Moore acknowledged that over his career he has had contentious conversations with coworkers but, except for Hansen, he did not "report all of those conversations." Moreover, Nevin admitted that for the past 1½ to 2 years of observing Hansen in contract negotiations, his impression of her was that of a notetaker. While in bargaining sessions Biggs-Adams would sometimes use profanity and derogatory terms to refer to management, Nevin acknowledged that Hansen never used that type of language. He also agreed that despite Moore's assertion that he was uncomfortable with the discussion with Hansen, Moore "continued" the conversation with Hansen as she turned to leave by asking her several questions. Last, there is no evidentiary value to the Respondent's anonymous witness. The Respondent's failure to produce the witness for cross-examination and my inability to assess her credibility discredits her as a witness. Equally important, the Respondent admits the witness "didn't hear any specifics of the conversation." Consequently, I find Hansen more credible in her denials about using derogatory terms to describe Brown.

[9] Hansen testified that Nevin asked her if she had referred to Brown as a "rat bastard." Moore insists he told the Respondent that Hansen called Brown a "rat fuck." While Nevin and Wenger were adamant that Moore said "rat." It is irrelevant to my analysis which iteration Hansen allegedly used because they are all derogatory terms, especially used in conjunction with "piece of shit." The witnesses agree that Moore alleged Hansen called Brown "a piece of shit."

[10] During the June 28, meeting with management, Hansen and Biggs-Adams asked for a list of the referenced policies, which are in the employee guidebook. (Tr. 106–107; GC Exh. 3; Jt. 2)

E. Charging Party's Request for Information

In the meeting the Respondent held with Hansen and Biggs-Adams on July 12, Wilson asked for the name of the anonymous witness Nevin and Wenger referenced in connection with their investigation of Moore's allegations against Hansen. Wilson stated the Union wanted to conduct its own investigation but Nevin refused. The Union felt the identity of the anonymous witness would have enabled them to get more information from her and assist the Union in deciding whether the disciplinary action was supported by the evidence. Following the meeting, Wilson told Biggs-Adams about the witness and asked her to write a letter to the Respondent requesting the name of the anonymous witness. By letter dated July 12, Biggs-Adams sent a letter to Wenger which reads in part:

> During today's follow-up to the disciplinary investigation by KOIN-TV of our member Ellen Hansen, Local President Kevin Wilson asked for the name of the witness to the allegedly inappropriate actions by Ms. Hansen.
>
> On the phone, General Manager, Pat Nevin, refused to provide the name of the witness. This email is our formal request for information of the name of the witness against Ms. Hansen. The Union is entitled to understand the allegations and to make our own independent investigation as to the facts of the incident, and therefore requests the name of the witness.

(Jt. Exh. 3.) Wenger forwarded the letter to Bush for a response. Bush wrote in part:

> We contacted the witness to inquire whether they would like to voluntarily disclose their identity and they declined, and they requested that we keep their identity confidential if possible. Given the disruptive and harassing nature of the behavior in question and the witness' request to remain unidentified, clearly we have a legitimate and substantial interest in preserving confidentiality that outweighs Ms. Hansen's desire to know the identity of the witness.
>
> Therefore, your request that we disclose the identity of the witness to Ms. Hansen's policy-violative conduct is denied.

(Jt. Exh. 4.) In the letter, the Respondent does not offer to bargain over an accommodation for the requested information. There is also no evidence that the Respondent has made a subsequent offer to bargain over an accommodation to provide the requested information.

III. DISCUSSION AND ANALYSIS

A. Written Warning

The General Counsel argues that the Respondent issued Hansen a written warning in violation of the Act because Hansen engaged in protected conduct that did not lose protection of the Act; the evidence establishes antiunion animus was a motivating factor in the decision to issue the written warning; the Respondent's reason for its action is pretextual; and Hansen is more credible than Moore. The Respondent counters that its action was based on a good-faith belief that Hansen had engaged in harassing and intimidating conduct towards a coworker; and Hansen lost protection of the Act because her conduct was abusive and threatening.

According to the General Counsel, the written warning issued to Hansen is unlawful under three different legal theories: *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964); *Atlantic Steel*, 245 NLRB 814 (1979); or *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The General Counsel argues that under the *Burnup & Sims* theory, the written warning is unlawful because Hansen's conversation with Moore was a union and protected concerted activity; the Respondent cannot show that it held an honest belief that Hansen engaged in serious misconduct; and assuming *arguendo* the Respondent's good-faith belief, the misconduct did not occur. Under the *Atlantic Steel* analysis, according to the General Counsel, Hansen's conversation with Moore was not sufficiently egregious to lose protection of the Act; and therefore, the basis for the written warning is flawed and unlawful. Last, the General Counsel contends that under the *Wright Line* standard, the Respondent's affirmative defense fails because it does not have comparators; and Moore was not a credible witness, which makes the Respondent's decision to issue the written warning to Hansen unlawful.

The Respondent agrees that the alleged 8(a)(1) and (3) violations should be analyzed under *Burnup & Sims* and *Wright Line*, respectively. However, the Respondent does not mention *Atlantic Steel*. Under *Burnup & Sims*, the Respondent insists that its action was lawful because the evidence clearly shows it had a good-faith belief that during her discussion with Moore, Hansen engaged in misconduct; and the General Counsel cannot sustain its burden because Hansen lost protection of the Act. Moreover, the Respondent argues that even assuming the General Counsel established its initial burden of proof under *Wright Line*, there is no violation of the Act because the evidence shows that the Respondent did not harbor nor exhibit any antiunion motivation in its decision to issue the written warning to Hansen.

1. *Burnup & Sims* analysis

The Board has consistently ruled that 8(a)(1) is violated if an employer takes an adverse action against an employee for "misconduct arising out of a protected activity, despite the employer's good faith belief, when it is shown that the misconduct never occurred." *Burnup & Sims* at 23. Under the *Burnup & Sims* analysis, the General Counsel has the initial burden of proving that the employee was subjected to an adverse employment action during the course of protected activity. If the General Counsel sustains its initial burden, the employer must then establish that it held a good-faith belief that the employee engaged in serious misconduct. Serious misconduct occurs when "the employee's activity is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate coworkers." *Aqua-Aston Hosp., LLC*, 365 NLRB No. 53, JD slip op at 5–6 (2017), (citing *Clear Pine Mouldings*, 268 NLRB 1044 (1984)). After the employer shows it held a good-faith belief that the employee committed serious misconduct, the burden shifts back to the General Counsel to establish, despite the employer's good-faith belief, the misconduct never occurred. *Aqua-Aston Hosp*., supra. JD slip op. at 6 (citing numerous authorities).

I find that the General Counsel has met its initial burden. Hansen's discussion with Moore about the benefits of unionization is the classic definition of union activity. Section 7 of the Act.

It is undisputed that towards the end of the workday Hansen greeted Moore to speak with him about the advantages of joining the Union. It is also undisputed that Moore was not a passive participant in the conversation but rather asked Hansen to explain "what the Union actually does for her. I was pretty curious to ask her if do (sic) you need it for protection." (Tr. 96.) Moreover, the evidence is undisputed that Hansen has been very active in the Union since at least 2005. It is also undisputed that the Respondent was aware of Hansen's protected union activity; and the Respondent admits that it issued Hansen a written warning solely because of the content of her discussion with Moore.

The burden shifts to the Respondent to establish that it held a good-faith belief that Hansen engaged in serious misconduct. The Respondent contends that Moore "credibly" relayed to management that Hansen accused him of having a 'secret" meeting and told him that his supervisor, Brown, was a "rat" and "piece of shit." According to the Respondent, it conducted a thorough investigation that found Hansen made those remarks which it deemed coercive and intimidating in violation of the company's policies. Since the investigation, in its judgment, established that Hansen's remarks to Moore made him feel "uncomfortable" and were disrespectful towards management, Hansen lost protection of the Act because her remarks constituted serious misconduct. According to the Respondent, "Hansen's offensive and vulgar statements to Moore, in addition to being clear-cut misconduct, do not fall under the protection of the Act . . . ." (R. Br. 12.) Despite my prior credibility determinations that Hansen's denials about making the remarks are truthful, I will, for the sake of argument, find that the Respondent established a good-faith belief. The burden shifts back to the General Counsel to show that the misconduct never occurred.

The General Counsel counters that the misconduct did not happen and even assuming it did take place, Hansen's action did not rise to the level of serious misconduct. The General Counsel argues that the Respondent "merely labeling conduct as harassment, . . . does not make it so." (GC Br. 24.) In support of its argument, the General Counsel asserts that Moore's shifting version of the conversation and his desire to maintain a good relationship with Brown so as to secure a future transfer undermines his credibility.

I find that Hansen did not engage in misconduct, serious or otherwise. Determining whether Hansen made the statements attributed to her is based in large part on credibility findings. In this instance I found that based on her demeanor and other evidence Hansen was more credible than Moore. There is no evidence that Hansen had a history of using profane language when referring to management. Likewise, there is no credible evidence that Hansen had a reputation for using profanity towards or about management. The record lacks testimony from Hansen's coworkers, supervisors, or other management officials attesting to such a pattern of behavior. Nevin acknowledged that, unlike Biggs-Adams, during the difficult and intense bargaining sessions, Hansen never spoke, did not use profanity, nor spew vitriolic names at the management team.

Even assuming Hansen made the statements attributed to her, I agree that discussions about unionization or encouragement of union organizing are protected by the Act "even when it annoys or disturbs the employees who are being solicited." (GC Br. 23 citing *Consolidated Diesel Co*., 332 NLRB 1019, 1020 (2000)); *Frazier Industrial Co*., 328 NLRB 717 (1999); *Automotive Plastics Technologies*, 313 NLRB 462 (1993); *Greenfield Die and Mfg. Corp*., 327 NLRB 237 (1998) and cases there cited (footnote omitted). Hansen cannot be guilty of serious misconduct merely for speaking to Moore about the Union, especially since Moore actively participated in the conversation by asking her questions. Moreover, calling management two derogatory names on one occasion while discussing the alleged tactics the employer uses to discourage union membership falls far short of the standard for establishing serious misconduct under *Burnup & Sims*. Id. Additional facts supporting a finding that Hansen did not engage in serious misconduct are: (1) the conversation was held in a semi-private location at the end of the workday; (2) the discussion was brief, lasting about 10 minutes; and (3) as Hansen ended the conversation Moore restarted it by asking her multiple questions. Consequently, the evidence simply does not support a finding that, even if true, Hansen's statements rise to a level of serious misconduct necessary to lose protection of the Act. Nevertheless, I will again emphasize that the evidence establishes that the misconduct did not occur.

Accordingly, I find that under the *Burnup & Sims* analysis, the Respondent violated the Act when it issued Hansen the written warning.

2. *Wright Line* analysis

A *Wright Line* analysis is not appropriate in this case because the Respondent's motivation is not at issue. I found that the written warning was issued because of Hansen's union activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003) (*Wright Line* analysis is not applicable when there is no dispute that the employer acted against the employee because the employee engaged in protected concerted activity).

Assuming arguendo Wright Line is an appropriate analysis, I find that the General Counsel has established its initial burden. It is undisputed that Hansen engaged in concerted protected activity. She is on the Union's executive board and participates in the negotiating sessions for a new CBA. Moreover, Hansen has been an active and open union supporter since about 2005 or 2006. More importantly, I previously found that her conversation with Moore about the benefits of joining a union is quintessential protected union activity. Second, the evidence is clear that the Respondent was aware of Hansen's protected union activity in that Moore told management about his conversation with Hansen, management was aware of her prior discussions with employees about the benefits of union membership, and she participated in the bargaining sessions with all of the management officials involved in the complaint at issue. Last, the letter of warning clearly shows that it was issued because of Hansen's conversation with Moore.

I find that the Respondent has failed to sustain its burden. First, I do not find, as previously explained, Moore's version of the incident more credible than Hansen's testimony of the encounter. Moreover, there is no comparative or other substantive evidence showing that the issuance of the written warning was not a deviation from past practices. See also Tr. 126–127. The plain language of the written warning is clear Hansen was

disciplined for exercising her § 7 rights. Further, throughout the decision, I have rejected the Respondent's argument that Hansen's statements to Moore were serious, egregious or constituted harassment. Last, even assuming there is no suspicious timing between the conversation and the written warning, there is sufficient evidence, as discussed, to support a finding that the Respondent has failed to sustain its burden of production.

Accordingly, assuming for the sake of argument that this case is properly analyzed under *Wright Line*, I find that the Respondent violated the Act when it issued Hansen the written warning.

3. Atlantic Steel analysis

In *Atlantic Steel,* the Board established several factors that must be considered in determining whether an employee who is engaged in concerted protected/union activity loses protection of the Act because of serious misconduct. The factors to consider are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel* at 816. In *NLRB v. Washington Aluminum Co*.,[11] the court held "concerted activity may be found unprotected when it involves conduct that is unlawful, violent, or otherwise "indefensible." Significantly, whether employees have lost the protection of the Act does not depend on the employer's "subjective perception" of their behavior. "Rather, the question is an objective one; i.e. whether the alleged misconduct is so serious that it deprives the employees of the protection the Act normally gives for engaging in concerted activity." *Kiewit Power Constructors Co*., 355 NLRB 708, 711 (2010), enfd., 652 F.3d 22 (D.C. Cir. 2011).

The General Counsel contends that Hansen's action did not lose protection of the Act under *Atlantic Steel* because her action did not (1) disrupt the Respondent's operation; (2) the conversation Hansen held with Moore "goes to the very heart of § 7 and Union activity;" and (3) Hansen's statements to Moore were not sufficiently egregious to lose protection of the Act.

The record is absolutely devoid of evidence that Hansen's conversation with Moore disrupted the Respondent's operation. Even assuming she characterized Brown as a "rat," "rat fuck" and "piece of shit", nothing in the record shows that the Respondent's operation was severely or even moderately or minimally affected by it. There is no credible evidence that anyone heard the conversation. Even if I were to consider the anonymous witness' statement, she acknowledged that she could not hear anything "specific." Also, the evidence failed to show, and Moore did not complain, that Hansen's remarks interfered with him or any other employee completing their work assignments. Second, the evidence is clear that Hansen's discussion with Moore about the benefits of joining a union goes to "the very heart of § 7 and Union activity." The Respondent's argument notwithstanding, earlier in this decision I found that the evidence establishes Hansen did not use the derogatory terms attributed to her and even assuming that she used those terms, it was not a "sufficiently egregious" outburst. *Burle Industries*, 300 NLRB 498, 500, 504 (1990), enfd., 932 F.2d 958 (3d Cir. 1991) (employee called supervisor a "fucking asshole" without losing protection of the Act); *United States Postal Service*, 250 NLRB 4 (1980) (employee did not lose protection of the Act when calling supervisor a "stupid ass"). Consequently, the fourth factor to consider under *Atlantic Steel*, whether Hansen's outburst was provoked by Respondent's unlawful activity, is inapplicable. In *KHRG Employer, LLC d/b/a Hotel Burnham & Atwood Cafe*, 366 NLRB No. 22, 2 (2018), the Board wrote "[w]hen, . . ., an employer defends a discharge based on employee misconduct that is a part of the res gestae of the employee's protected concerted activity, the employer's motive is not at issue. Instead, such discharges are considered unlawful unless the misconduct at issue was so egregious as to lose the protection of the Act. See, e.g., *Consumers Power Co*., 282 NLRB 130, 132 (1986) ('[W]hen an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act . . .') (footnote omitted). The Board balances employees' right to engage in concerted activity, allowing some leeway for impulsive behavior, against employers' right to maintain order and respect. *Piper Realty Co*., 313 NLRB 1289, 1290 (1994); *NLRB v. Thor Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964)." Id.

Accordingly, I find that under *Burnup & Sims*, *Wright Line*, and *Atlantic Steel*, the Respondent violated § 8(a)(1) and (3) of the Act when it issued Hansen a written warning.

B. Request for Information

In view of my findings above ruling on the merits of this issue is unnecessary. Nevertheless, I will analyze it for the sake of appeal. Section 8(a) (5) of the Act mandates that an employer must provide a union with relevant information that is necessary for the proper performance of its duties as the exclusive bargaining representative. *NLRB v. Truitt Mfg. Co*. 351 U.S. 149, 153 (1956); *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979). "[T]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *NLRB v. Acme Industrial Co*., 385 U.S. 432, 436 (1967). Information requests regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and must be provided. *Whitesell Corp*., 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 635, 649 (2010), enfd. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co*., 344 NLRB 231, 235 (2005). If the requested information is not directly related to the bargaining unit, the information is not presumptively relevant, and the requesting party has the burden of establishing the relevance of the requested material. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *The Earthgrains Co.*, 349 NLRB 389 (2007).

The standard for establishing relevancy is the liberal, "discovery-type standard." *Alcan Rolled Products*, 358 NLRB 37, 40 (2012), citing and quoting applicable authorities; *Shoppers Food Warehouse, Corp*., 315 NLRB 258, 259 (1994); *Bacardi Corp*., 296 NLRB 1220 (1989). In *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992), the Board summarized its application of the principles as:

[T]he Board has long held that Section 8(a)(5) of the Act

[11] 370 U.S. 9, 17 (1962).

> obligates an employer to furnish requested information which is potentially relevant to the processing of grievances. An actual grievance need not be pending nor must the requested information clearly dispose of the grievance. It is sufficient if the requested information is potentially relevant to a determination as to the merits of a grievance or an evaluation as to whether a grievance should be pursued. *United Technologies Corp*., 274 NLRB 504 (1985); *TRW*, *Inc*., 202 NLRB 729, 731 (1973).

The requested information does not have to be dispositive of the issue for which it is sought, but only has to have some relation to it. *Pennsylvania Power & Light Co*., 301 NLRB 1104, 1104–1105 (1991). Moreover, the Board does not assess the merits of the underlying dispute to determine the relevancy of the request for information. *Postal Services*, 332 NLRB 635 (2000). The Board has also held that a union may make a request for information in writing or orally. Further, the Board has found that a delay is unreasonable when the information requested is easily and readily accessible from an employer's files. *Bundy Corp*., 292 NLRB 671, 672 (1989).

Once a union has demonstrated the relevancy of the request for information, the burden shifts to the employer to establish that the information is not relevant, does not exist, or some other valid and acceptable reason could not be furnished. *Samaritan Medical Center*, 319 NLRB, 392, 398 (1995), citing *Somerville Mills*, 308 NLRB 425 (1992), and *Postal Service*, 276 NLRB 1282 (1985).

The General Counsel asserts that I should use the "missing witness rule"[12] and draw an adverse inference that "the witness' testimony would not have corroborated Respondent's version of events." (GC Br. 36.) The "missing witness rule" provides:

> Where relevant evidence which would properly be part of a case is within the control of the party whose interest it would normally be to provide it, and he fails to do so without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him.

29 Am. Jur. §178. The Respondent counters that it did not produce the name of the anonymous witness to the Union because it was confidential information; and under *Michigan Bell Telephone Co*.[13] it was not obligated to turn over the information. Although not explicitly stated by the Respondent, it is implied that these are the same reasons for its failure to call the anonymous witness to testify. Since the arguments for finding an adverse inference and finding the Respondent in violation of the Act for failing to respond to the RFI are intertwined, I will address both as one.

1. Relevancy

Based on the evidence, I find that the General Counsel has sustained its initial burden. The General Counsel argues that the RFI is necessary and relevant for the Union to fulfill its role as the exclusive representative of bargaining unit employees. Biggs-Adams gave credible testimony that acquiring the name of the anonymous witness would assist the Union in determining whether the disciplinary action against Hansen was warranted. Likewise, in her letter to the Respondent dated July 12, Biggs-Adams made clear that the Union needed the information "to make our own independent investigation as to the facts of the incident . . . ." (Jt. Exh. 3.) The Respondent does not dispute that the RFI is relevant and it did not provide the requested information. Also, the witness' name is relevant because the Respondent did not fulfill its legal obligation and engage in accommodative bargaining so there was no other way for the Union to get the information except to solely rely on the word of the Respondent, which places the Charging Party at a severe disadvantage in representing Hansen.

Analyzing the relevancy of the information under the liberal "discovery-type standard", I find that the RFI meets the standard. Therefore, the burden shifts to the Respondent to establish that the information is not relevant, does not exist, or for some other valid and acceptable reason could not be furnished.

2. Confidentiality defense

The Respondent insists that it could not provide the witness' name because: (1) the witness wanted to remain anonymous because she worked closely with Hansen and pursuant to the employee handbook her anonymity is assured as part of the investigative process; and (2) *Michigan Bell* supports its argument that the Charging Party Union was not entitled to the witness' identity. (GC Exh. 3.) The General Counsel counters that: (1) *Michigan Bell* is distinguishable and the Respondent failed to offer sufficient justification in support of its confidentiality defense; and (2) the Respondent did not meet its "affirmative obligation" to devise a reasonable method to accommodate the Union's request.

It is well settled law that the party asserting confidentiality has the burden of proof. *Postal Service*, 356 NLRB 483 (2011); *Detroit Newspaper Agency*, 317 NLRB 1071 (1995); *Northern Indiana Public Service Co*., 347 NLRB, 210, 211 (2006). Even if the Respondent meets its burden, it cannot simply refuse to furnish the information, but rather must engage in accommodative bargaining with the Union to seek a resolution that meets the needs of both parties. In *Alcan Rolled Products*, the Board explained:

> Confidential information is limited to a few general categories that would reveal, contrary to promises or reasonable expectations, highly personal information. *Detroit Newspaper Agency,* 317 NLRB 1071, 1073 (1995). Such confidential information may include "individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits." Id.

The disclosure of the information must be balanced against the confidentiality and privacy interests raised by Respondent. *Detroit Edison Co*., supra.

The Respondent's argument that the witness should remain anonymous because she works closely with Hansen and the employee handbook assures her anonymity is insufficient without some credible evidence of witness intimidation, coercion or

[12] 29 Am. Jur. §178.

[13] 367 NLRB No. 74 (January 24, 2019).

other threats to the witness' safety. There is no evidence nor allegations that Hansen has threatened, intimidated, been verbally or physically violent against the witness or any other employee. Even Moore describes his interaction with Hansen as merely "uncomfortable" which is far short of accusing her of being violent, intimidating or threatening. Moreover, there is no evidence that Hansen's interaction with Moore significantly, if at all, interfered with him completing his work. Last, the Respondent cites no Board or case law to support its argument on this point.

The Respondent argues that in considering whether it is required to reveal the identity of the witness, I should be guided by the Board's decision in *Michigan Bell*. In *Michigan Bell*, a sizeable group of unit employees refused to work overtime in response to management enacting mandatory overtime despite their longstanding objections. In the midst of negotiating a settlement with the union over the action, which included discipline of the unit members involved, management announced a new mandatory overtime policy. Consequently, about 40 of the unit employees attended a general union meeting where at least 1 of the members proposed another work action to protest the new overtime policy. There was an informant in the meeting who tipped off management to the possible action. As a result of the informant's information, management questioned several unit employees suspected of agitating for the job action. The union later learned that the employer questioned the employees based on the informant's tip, so it requested from the employer the name of the informant, a summary of the informant information, and the distribution list. The employer refused all the requests and ultimately suspended 5 of the unit employees. The Board concluded that the employer violated the Act by refusing to provide the union with a summary of the informant information because it was relevant to what the employer knew about the potential job action. However, the Board held that the employer did not violate the Act by withholding the name of the informant because, based on the specific facts of the case, the union did not need the name of the informant to help it understand whether the employer's actions were consistent with the CBA.

The case at issue, however, is distinguishable from *Michigan Bell*. In *Michigan Bell*, the employer did not believe the unit employees engaged in protected concerted activity; and therefore, refused to provide the informant's name because it did not believe the information was relevant. There is no dispute that Hansen engaged in union protected activity, which I have found did not lose protection of the Act. In *Michigan Bell*, there was evidence of union animosity towards the informant. There is no such evidence in this case. Moreover, the witness' identity in this case has a direct correlation to the Union's ability to conduct an independent investigation into her statements by judging her credibility and probe for inconsistencies in her retelling of events. The dispute in *Michigan Bell* involved whether the employer was complying with a provision of the CBA. According to the Board, the union's ability to evaluate and prosecute the grievance did not depend primarily on the credibility of the informant. However, in this matter the case is primarily a "he said, she said" and the only allegedly "corroborating evidence" is from an anonymous witness. Here the anonymous witness was the only evidence the Respondent presented to corroborate Moore's claim that he wanted to get away from Hansen's "rants" about management. Consequently, assessing the credibility of the witness is of heightened importance.

Even assuming Respondent sustained its confidentiality defense, it was still obligated to engage in accommodative bargaining with the Union, but the evidence shows it failed to meet its duty on this point. There is no evidence that Respondent made any attempts at engaging the Union in accommodative bargaining. Despite the Respondent's assertion to the contrary, the initial burden lies with the Respondent.[14] *Detroit Newspaper Agency*, supra at 1072; *Northern Indiana Public Service Co*., supra at 211; *Pennsylvania Power & Light Co*., supra at 1105.

Accordingly, I find that Respondent's failure to provide the information requested violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Nexstar Broadcasting, Inc. d/b/a KOIN-TV, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, operating a television station in Portland, Oregon.

2. The Charging Party, National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL–CIO is, and, at all material times, has been the exclusive bargaining representative for the following appropriate units:

> All regular full-time and regular part-time engineers and production employees, but excluding chief engineer, office clericals, professionals, guards, and supervisors as defined in the Act, and all other employees of KOIN-TV.
>
> All regular full-time and regular part-time news, creative services employees, and web producers, but excluding news producers, IT employees, on-air talent (aka "performer"), office clericals, professionals, guards, and supervisors as defined in the Act, and all other employees of KOIN-TV.

3. By its failure and refusal to provide the necessary and relevant information requested by the Charging Party on or about July 12, 2018, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

4. By issuing a written warning to Ellen Hansen on or about July 12, 2018, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act and discriminating in regard to terms or conditions of employment, thus discouraging union activity in violation of Section 8(a)(1) and (3) of the Act.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act except as set forth above.

REMEDY

The Respondent will be ordered to cease and desist from failing and refusing to bargain collectively with the Charging Party

[14] Tr. 20.

by refusing to provide the requested information.

Moreover, the Respondent will be ordered to furnish the Charging Party with the information requested as specified in paragraphs 7(a) and (b) of the complaint.

The Respondent will be ordered to rescind the written warning dated July 12, 2018, from Ellen Hansen's personnel file and any other files containing a copy of or reference to the written warning; and cease and desist from issuing disciplinary action to employees for exercising their Section 7 rights under the Act.

The Respondent will also be ordered to post and communicate by electronic post to employees the attached Appendix and notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Nexstar Broadcasting, Inc. d/b/a KOIN-TV, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Charging Party, National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL–CIO by failing and refusing to provide the Charging Party with information requested that is necessary and relevant for its ability to perform its duties as the exclusive collective-bargaining representative of the units.

(b) Disciplining or otherwise discriminating against employees because they have conversations with coworkers about the Union or engage in protected, concerted activities.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of the Board's Order, furnish the Charging Party with the information, as specified in the complaint, it has requested since on or about July 12, 2018.

(b) Within 14 days from the date of the Board's Order, the Respondent must remove from its files (both official and unofficial) all references to the discipline issued to Ellen Hansen relating to the events in about May 2018; and within 3 days thereafter, notify her in writing that this has been done and that the written warning will not be used against her in any way.

(c) Within 14 days after service by the Region, post at its facility in the Portland, Oregon metropolitan area copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. June 3, 2020

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.[17]

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to provide National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL–CIO with requested information that is relevant and necessary to the processing of grievances filed by the Union.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[17] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 day after the facility reopens and a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discipline you for engaging in conversations with coworkers about the Union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL, to the extent we have not already done so, provide the Union with the information it requested as set forth in paragraphs 7(a) and (b) of the complaint.

WE WILL rescind the unlawful written warning issued to Ellen Hansen on or about July 12, 2018.

WE WILL remove from our files all reference to the written warning issued to Ellen Hansen on or about July 12, 2018, and WE WILL notify her in writing that this has been done and that the written warning will not be used against her in any way.

NEXSTAR BROADCASTING, INC. D/B/A KOIN-TV

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-232897 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, D.C. 20570, or by calling (202) 273-1940.